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IN THE
Supreme Court of the United States
October Term, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner

VERSUS

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner

VERSUS

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT.
LOUISIANA STATE BANK COMMISSIONER

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IN THE
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OCTOBER TERM, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
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BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
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**BRIEF FOR RESPONDENT,
LOUISIANA STATE BANK COMMISSIONER**

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in holding that the scheme of reorganization devised by the Whitney National Bank of New Orleans, under which banking offices would be organized and opened in

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nearby Jefferson Parish, Louisiana, violated the prohibitions against branch banking contained in 12 U.S.C. 36(e) and that the Comptroller of the Currency was properly enjoined from issuing a certificate of authority for such operation to begin business in Jefferson Parish, Louisiana?

2. Was the District Court correct in ruling that Act 275 of the 1962 Legislature, the Louisiana State Bank Holding Company Act, is constitutional; that said Act prohibits a wholly owned subsidiary of a Louisiana-incorporated Bank Holding Company, from opening for business; and that the Comptroller of the Currency has no discretion to issue a certificate of authority that will permit same to open and operate in a manner prohibited by law?

3. Does the Louisiana State Bank Commissioner, the officer charged with the responsibility of administering the banking laws of the State of Louisiana, have standing to intervene herein to challenge the unlawful actions of the Comptroller of the Currency in issuing a certificate of authority to license an operation in violation of both State and Federal law?

COUNTER-STATEMENT OF THE CASE

The State Bank Commissioner of Louisiana adopts the counter-statement of the case contained in the brief of the other respondents herein, Bank of New-Orleans and Trust Company, et al., with the following additions:

Respondent is The State Bank Commissioner for the State of Louisiana, the officer charged with the responsibility of administering the banking laws of the State. As such, Respondent is vitally interested

in the issues involved here because the Whitney scheme to establish additional banking facilities in adjacent Jefferson Parish, if allowed to materialize, will have a direct and adverse effect on the State of Louisiana, its banking laws, and all State chartered banking institutions under the supervision of the State Banking Department.

The State of Louisiana has always been opposed to monopoly, undue concentration and destructive, unfair competition in its banking industry (J.A. 162, 163). The public policy of this State in this respect has been preserved and fostered for many years by statutes, both Federal and State, which make it unlawful for either national or state banks in Louisiana to open branch offices or additional banking facilities in the State at locations beyond the limits of the parish (County) in which their main offices are located. Because of this long standing legal prohibition against inter-parish banking and the announced public policy of the State, Louisiana's dual banking system has been preserved and independent unit banks have prospered and grown.

Petitioners readily concede in their briefs before this Court that under the existing provisions of the National Bank Act (12 U.S.C. 36[e]) and Title 6, Section 54, of the Louisiana Revised Statutes, Whitney National Bank of New Orleans (hereinafter called Whitney-New Orleans) is absolutely prohibited from opening and operating any banking offices or facilities beyond the Parish of Orleans where Whitney's main office is located (Whitney Brief, p. 4; Saxon Brief, p. 3). Faced with these prohibitions against direct branching, Whitney-New Orleans devised a plan, with the assistance and approval of the Comptroller of the

Currency, to evade and circumvent the State and Federal laws restricting branch banking and set about to accomplish indirectly that which it was prohibited from doing directly, i.e., establish banking facilities in Jefferson Parish (J.A. 42, 43, 277, 278). In order to accomplish its objective, Whitney-New Orleans first created through its own officers and directors and with \$350,000 of its own funds, a Louisiana Bank Holding Company (hereinafter called Whitney Holding), which in turn, by means of an intricate corporate maneuver and merger, acquired complete ownership of Whitney-New Orleans. Whitney-New Orleans then provided \$650,000 of its funds to Whitney Holding with which Whitney Holding, a mere conduit for the transfer of funds, proposed to establish a wholly owned and controlled banking facility in Jefferson Parish (hereinafter called Whitney-Jefferson). The detailed chronology of the Whitney plan is set forth at J.A. 446, 461 and 462.

The Whitney plan represents the first time that a bank doing business in the State of Louisiana has ever attempted to frustrate the branch banking laws and public policy of the State through the subterfuge of a holding company. Additionally, respondent believes that this is the first time that a Comptroller of the Currency has assisted a national bank in formulating a plan admittedly designed for the express purpose of evading State and Federal laws prohibiting inter-parish banking. If the Whitney plan is allowed to materialize it will only be a question of time before every national bank in the country will seek to take advantage of this scheme to evade branching restrictions and as a result the protection historically afforded to the independent unit bank by the National

Bank Act against monopolistic control and concentration in the banking industry would no longer exist.

When it became apparent that the Comptroller of the Currency was going to license this clear-cut circumvention of the law, an emergency situation arose in the Louisiana banking industry. The State Bank Commissioner immediately requested an opinion from the Attorney General of Louisiana as to the legality of Whitney's scheme to establish additional banking facilities in Jefferson Parish. The Attorney General ruled that "a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a Parish other than the domicile of its parent company" (J.A. 163, 164, 289).

The instant litigation was instituted on June 9, 1962 by three Louisiana state banks against the Comptroller of the Currency in order to prevent the Comptroller from unlawfully issuing a certificate of authority to the proposed Jefferson Parish bank and sought to obtain: (a) a declaratory judgment to the effect that a combination of Federal and State law make it unlawful for the Comptroller to issue a final certificate of authority authorizing Whitney-Jefferson to open in Jefferson Parish as a subsidiary of Whitney Holding, and (b) a permanent injunction restraining the Comptroller of the Currency from issuing such certificate of authority.

In the meantime, the Louisiana Legislature, pursuant to the jurisdiction and powers reserved to the States under 12 U.S.C. Section 1846, the Federal Bank Holding Company Act, passed a State Bank Holding Company Act (Act 275 of 1962; L.S.A.-R.S. 6:1001,

et seq.) to meet this emergency and to forestall bank holding companies from any further attempt to defeat and circumvent Louisiana's long standing public policy and law against monopolistic branch banking. The emergency confronting the State banking industry was rendered particularly acute by virtue of the fact that Whitney-New Orleans, the proponent of the holding company scheme to accomplish inter-parish banking, is the largest bank by far in the entire State and already controls a major portion of the available banking business in the areas of Louisiana involved (J.A. 99, 275).

Louisiana Act 275 of 1962 was overwhelmingly passed by both Houses of the Legislature. It was designated emergency legislation by the Governor and thus became effective immediately on July 10, 1962. Section 1 of the Act sets forth clearly the policy of this state:

“It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank and institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and their subsidiaries.”

Section 3 of Act 275 provides, in part:

“It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now open for business, whether or

not, a charter; permit, license or certificate to open for business has already been issued"

On July 10, 1962, the effective date of Act 275, Whitney-Jefferson, the proposed subsidiary of the holding company, had not yet opened for business because the United States District Court for the District of Columbia had already granted a preliminary injunction enjoining the Comptroller of the Currency from issuing the certificate of authority which would authorize it to commence banking business (J.A. 221).

After passage of Act 275, petitioners immediately attacked the Act contending: (1) that it was not applicable to Whitney-Jefferson, a national bank; and (2) that if the Act were held to be applicable to said bank, then it was unconstitutional. All parties promptly moved for summary judgment and The State Bank Commissioner, with the consent of all parties, moved to intervene as a party plaintiff pursuant to Rule 24 of the Federal Rules of Civil Procedure (J.A. 346, 347). It was stipulated that the District Court should properly determine, in addition to the other issues already raised by the pleadings, whether Act 275 of 1962 effectively precluded the Comptroller from issuing a certificate to Whitney-Jefferson (J.A. 384, 385, 386).

After submission of briefs and extensive oral argument, the District Court granted respondents' cross-motions for summary judgment (J.A. 434-438, 444-450) and permanently enjoined the Comptroller of Currency from issuing or delivering a certificate of authority to Whitney National Bank in Jefferson Parish, or to any persons or corporations in active concert, or participation therewith (J.A. 450-452). Judge McLaughlin held that Act 275 of 1962 was con-

stitutional, having been enacted pursuant to the powers and jurisdiction reserved to the states by the Federal Bank Holding Company Act, 12 U.S.C. § 1846; that Act 275 of 1962 is directly applicable to Whitney-Jefferson, a wholly owned subsidiary of a Louisiana incorporated bank holding company; that said statute makes it unlawful for Whitney-Jefferson to commence the business of banking in Louisiana; and that the Comptroller of the Currency has no discretion to issue a certificate of authority to commence a banking business in a manner prohibited by law (J.A. 448-450).

Petitioners Whitney and Saxon each filed separate appeals which were later consolidated.

On August 14, 1963 the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the District Court on different grounds and held that the elaborate and ingenious scheme of reorganization devised by Whitney-New Orleans for the establishment of additional banking facilities in Jefferson Parish was tantamount to the establishment of a branch bank and therefore prohibited by 12 U.S.C., § 36(e) (J.A. 454-477). Having disposed of the case under 12 U.S.C. 36, the Court deemed it unnecessary to consider whether Act 275 of 1962 of the Louisiana Legislature also prohibits the opening of the Jefferson Parish Bank.

SUMMARY OF ARGUMENT

I

The announced and sole purpose of the Whitney-New Orleans plan of reorganization was to enable Whitney to establish wholly owned banking facilities in nearby Jefferson Parish. This plan constitutes a clear violation of both State and Federal law which has historically prohibited inter-parish branch banking in Louisiana. The use by Whitney of a holding company, organized by it with its own capital funds, to establish banking facilities in a prohibited area is an attempt to accomplish indirectly that which it is prohibited from doing directly and the Court of Appeals correctly ruled that the corporate veil should be pierced to reveal the proposed Whitney subsidiary as a forbidden branch.

II

That State of Louisiana, pursuant to the express powers reserved to it under the Federal Bank Holding Company Act (12 U.S.C. 1846) enacted a State Bank Holding Company Act (Act 275 of 1962) which makes it unlawful for any bank holding company or subsidiary thereof to open for business any bank not already opened for business. The proposed holding company subsidiary in Jefferson Parish had not opened for business on the effective date of the Act, and consequently under the explicit prohibition contained therein can never open for business. The Louisiana Bank Holding Company Act is clearly constitutional and directly applicable to Whitney Holding and Whitney Jefferson. Accordingly, the District Court correctly held that the Comptroller

had no discretion to issue a certificate of authority which would authorize the commencement of banking business prohibited by law.

III

The State Bank Commissioner intervened in this action pursuant to the provisions of Rule 24 of the Federal Rules of Civil Procedure, and the appellants formally consented to his intervention. The District Court thereupon entered an Order making the Commissioner a party plaintiff. Appellant Comptroller, under these circumstances, cannot now be heard to complain that the Commissioner is without standing. Furthermore, the Commissioner clearly has standing in this action, where both petitioners and respondents are litigating with regard to Louisiana Act 275 of 1962 and Louisiana Rev. Statutes 6:54, which, by law, are to be administered and enforced by the Commissioner.

ARGUMENT

I.

The Whitney Plan Is Unlawful Under the Express Provisions of Section 36(c) of the National Bank Act (12 U.S.C. 36) and Title 6, Section 54 of the Louisiana Revised Statutes.

There can be no doubt about the fact that the Whitney plan was concocted solely to enable Whitney-New Orleans to accomplish indirectly that which it was prohibited from doing directly, i.e., establish additional banking facilities in Jefferson Parish. As stated by the Court of Appeals in the instant case:

“There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in East

Jefferson Parish which it would manage and control."

The Federal Reserve Board in its written statement in support of its approval of Whitney's application to become a bank holding company recognized the Whitney program for what it is. The Board stated:

"The stated purpose of the proposed holding company system is to enable an organization centered about Whitney of New Orleans to provide banking services, not only through its existing twelve offices within the City of New Orleans, but also through offices in The East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney-New Orleans; in fact, for present purposes, the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank." (J.A. 100)¹

The President of the Whitney National Bank of New Orleans was quite candid in his testimony before the Federal Reserve Board in January of 1962 when he, in effect, admitted that the sole objective of the

¹ It is interesting to note that the Federal Reserve Board, although frankly admitting that the entire Whitney Plan was devised solely to enable the Whitney organization to move into Jefferson Parish, took the position that any criticism of the plan as being unlawful under the National Bank Act should be answered by the Comptroller and not the Board. In this respect, the Board ruled that such criticism relates "largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department." (J.A. 168, 286, 287). The Comptroller, however, when asked to comment on such by the Board refused to do so. (J.A. 424, 425, 426). It is therefore submitted that petitioner's argument which suggests that any attack upon the Whitney plan as a violation of Section 36(e) can only be brought before the Federal Reserve Board is wholly without merit.

plan of reorganization was to evade the restrictions against branching and to permit the Whitney to enter Jefferson Parish. Mr. Berry stated:

"Under present laws in our State, the Whitney is not permitted to establish branches outside the Parish of Orleans. (J.A. 64) . . .

"The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish . . . and to participate in the further growth of that area. (J.A. 65) . . .

"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company. (J.A. 65)

"The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock of which would be also owned by the Holding Company. (J.A. 65) . . .

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of \$650,000 in capital funds which will be put into the Jefferson Parish Unit as capital for it." (J.A. 68) (Emphasis supplied)

Of course, this plan was not devised without the assistance of the Comptroller of the currency who as

stated by the Court of Appeals "was not gulled by the ruse" and fully recognized the objective sought by Whitney. As a matter of fact, it is evident from the affidavit filed herein by the Comptroller (J.A. 42, 43) that the Office of the Comptroller actually furnished advance advice and guidance to the Whitney as to how it might successfully evade the restrictions against branch banking and establish additional banking facilities in Jefferson Parish.

• Petitioners attempt to justify the Whitney plan of reorganization and its objective by contending that the branching restrictions contained in the National Bank Act do not apply to a bank holding company. Obviously, the position taken by petitioners is untenable because otherwise every national bank in the country could evade branch banking laws merely forming a bank holding company through which it could establish and capitalize subsidiary banks without geographical limitation. If this were permitted, Section 36(e) of the National Bank Act would certainly become a "dead letter". (J.A. 260). While it may be true that Congress enacted the Bank Holding Company Act of 1956 to control and regulate the formation and growth of bank holding companies, this does not mean that a subsidiary of a bank holding company can never be considered a forbidden branch within the meaning of Section 36(e) of the National Bank Act. In 12 U.S.C., § 36, Congress gave a broad meaning to the word "branch":

"(f) The term branch as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state . . . at which deposits are received, or checks paid, or money lent."

Clearly, this definition would include the proposed banking facility in Jefferson Parish as it was characterized by the President of the Whitney-New Orleans in a letter to the stockholders dated October 28, 1961 (J.A. 32, 33):

"We are firmly convinced, after careful consideration of the alternatives, that your common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of pooling all of the deposits of all of our customers and of our capital funds for their use and for the development of this community. From the depositors point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management. . . .

"Under the holding company approach the relationship is completely owned by the stockholders of the holding company who will be all the present stockholders of the Whitney National Bank and their successors.

"By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can be affiliated banks. There will be no minority stockholders to be effected."

"From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the

two parishes. He will have the full benefits of the relationship of a large bank and its officers.

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. *The corporate identity of the 78 year old Whitney National Bank, Whitney prestige and assets values inherent therein, is fully preserved under the holding company procedure, as is your undiluted ownership thereof.*" (J.A. 33)

The Court of Appeals in the instant case correctly described the Whitney scheme as "a boot strap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory".

The arrangement sought to be adopted by Whitney is not typical of a normal transaction by which a bank holding company acquires a subsidiary bank with capital furnished by its investors. On the contrary, the Whitney scheme involves a situation wherein a single bank, for the admitted and announced purposes of evading state branching laws, sets out to capitalize a holding company with its own funds, and, by using said holding company as a conduit, to furnish the initial capitalization for a subsidiary bank in an adjoining parish.

It is "the nature of the arrangement, and not the label applied to it" which "determines the character of the relationship between two banking institutions." (J.A. 471). The proposed bank in Jefferson Parish cannot be considered in the nature of an "affiliate" arrangement as was approved by the District of Columbia Circuit in *Camden Trust Co. v. Gidney*, 301

F.2d 521 (1962). Unlike the Whitney scheme, the *Camden* situation involved the investment of fresh new capital by individual stockholders. This type of arrangement was specifically rejected by the Whitney organization because it felt that such would not permit complete control by the Whitney National Bank. This was bluntly stated by the President of the Whitney Bank:

“... We have been unwilling to go with an affiliate which we couldn’t hold on to necessarily.

“It doesn’t become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.

“The thing that makes this [holding company approach] interesting to us is the ability to approach the branch phase of it . . .” (J.A. 74)

What the President of the Whitney Bank was in effect stating is that Whitney was seeking the “unitary type of operation” which the Ninth Circuit in the case of *First National Bank in Billings v. First Bank Stock Corporation*, 306 F.2d 397 (9th Cir. 1962), described as characteristic of branch banking.

The Comptroller of the Currency was apparently satisfied to rely on the mere form of the Whitney transaction and to disregard the true nature of it. However, the Court of Appeals was not so inclined and felt compelled to “pierce the corporate veil” to expose the subterfuge.

It is a well established principle of law that courts may disregard corporate entities or devices admittedly created to circumvent or evade the prohibitions of federal statutes, and the courts have done so on numerous

occasions. See: *Fletcher, 1 Cyclopediac Corporation, § 45*; *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946); *Alabama Power Company v. Federal Power Commission*, 94 F.2d 601, 608; *Ohio Tank Car Company v. Keith Railway Equipment Company*, 148 F.2d 4, 6; *Metropolitan Holding Company v. Snyder*, 79 F.2d 263, 267; *Fitz-Patrick v. Commonwealth Oil Company*, 285 F.2d 726, 730.

The foregoing rule was aptly stated by the Court of Appeals for the Second Circuit in *Corn Products Refining Company v. Benson*, 232 F.2d 554, 465 (1956):

"The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute . . . Corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute . . ."

The fact that the particular corporate entity is a bank holding company does not prevent a court from examining the true nature of the relationship between said holding company and its subsidiary to determine whether or not the subsidiary is in reality a forbidden branch. This was stated unequivocably by the court in *First National Bank of Billings v. First Bank Stock Corporation*, *supra*, and the following language is particularly apposite to the instant case:

"We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

The "realities" of the instant case demand that the Court disregard the corporate subterfuge created by

Whitney-New Orleans and that the proposed bank in Jefferson Parish be classified as a forbidden branch.

An additional issue at stake here is the long-established national policy of protecting and fostering the dual banking system by maintaining competitive equality between National and State Banks. This competitive equality is guaranteed by Section 36 of the National Bank Act, which adopted state law as a measuring stick for determining where national banks might establish branches. *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir. 1958) Respondents are State chartered banks prohibited by law from opening branch banks or other banking facilities beyond the limits of the parish in which their main offices are located, either directly or indirectly through the device of a holding company financed by them. The Attorney General of Louisiana has construed the branch banking provisions of Louisiana law, which the Comptroller must recognize as a part of the Federal law restricting branching by national banks, as precluding a bank holding company from acquiring a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company. (J.A. 164). Consequently, a State bank, similarly situated to the Whitney National Bank of New Orleans could not utilize the procedure which Whitney has attempted to follow to secure an office in Jefferson Parish. Any application submitted by a State bank in the form of a holding company or otherwise would necessarily have to be rejected as an attempt to establish a forbidden branch. The Comptroller in administering the Federal statute is required to follow the construction which the State of Louisiana has given to its own laws regulating branch banking. If the Comptroller is permitted to disregard the laws of a state

pertaining to branch banking, the competitive equality between state and national banks which Congress has consistently sought to preserve will be destroyed. Respondent therefore submits that the Court of Appeals correctly concluded that the Comptroller was properly enjoined from issuing a certificate of authority to Whitney-Jefferson on the grounds that the opening of said bank is prohibited by 12 U.S.C., § 36.

II.

Act 275 of 1962, Enacted Pursuant to a Reservation of Power and Jurisdiction to the States by the Congress of the United States in the Federal Bank Holding Company Act (12 U.S.C. 1846) Makes It Unlawful for the Whitney National Bank in Jefferson Parish, a Wholly Owned Subsidiary of a Louisiana Incorporated Bank Holding Company, to Commence Banking Business and the Comptroller of the Currency Has No Discretion to Issue a Certificate of Authority Authorizing It to Commence An Unlawful Operation.

In granting respondents' cross-motions for summary judgment and permanently enjoining the Comptroller of the Currency from issuing or delivering a certificate of authority to the Whitney-Jefferson, Judge McLaughlin of the District Court held that Act 275 of 1962 was directly applicable to Whitney-Jefferson, a wholly owned subsidiary of a Louisiana incorporated bank holding company; that such statute was constitutional; that the said statute makes it unlawful for Whitney-Jefferson to commence business in Jefferson Parish; and that consequently the Comptroller of the Currency has no discretion to issue a certificate to license an operation prohibited by law (J.A. 444-450). Counsel submits that the District Court's decision is eminently correct in view of the fact that the constitutionality of similar state statutes has been upheld by

all of the authorities which have considered the precise question, including the United States Supreme Court. See: *Braeburn Securities Corporation v. Smith*, 15 Ill.2d 55, 153 N.E.2d 806 (1958); *Opinion of the Justices*, 151 A.2d 236 (1959).

In the *Braeburn* case, *supra*, the Court had under consideration the Illinois Bank Holding Company Act of 1957 and the Illinois Supreme Court upheld the applicability of the Act to national banks. The Court stated at 153 N.E.2d 808:

“The . . . 1957 Act . . . clearly manifests a legislative determination that future ownership and control of banks in Illinois by bank holding companies must be stopped . . .

“. . . Branch banking in Illinois has been prohibited for many years . . .

“It is clear that this prohibition could be circumvented and indirect branch banking result if, through ownership of bank stock, one or more bank holding companies could control several banks. Branch banking can be accomplished by one bank operating at several locations or by one company owning and controlling several banks variously located.

“In 1956, Congress adopted legislation regulating bank holding companies (12 U.S.C.A. § 1841, et seq.); and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that the administration of the Federal Act should be within the confines of State law, if any. The Illinois legislation, as well as legislation in New York, new Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal Act that the States should act if, *as a matter of*

policy, bank holding company legislation more restrictive than the Federal Act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field."

An appeal in the *Braeburn* case was dismissed for want of a substantial federal question by the United States Supreme Court, 359 U.S. 311 (1959), an action even stronger than judicial affirmance. *Milheim v. Moffatt Tunnel Improvement Dist.*, 262 U.S. 710, 716 (1923).

In 1959 the Justices of the Supreme Court of New Hampshire considered the constitutionality of a proposed bank holding company in New Hampshire, which, like the Illinois statute, defined "bank" as including national banks. The Court, in *Opinion of the Justices*, supra, held that state legislation pertaining to bank holding companies could be applicable to national as well as state banks, since Congress had not manifested an intention to pre-empt the legislative field. The Court went on to state:

"Furthermore at least seven states (Illinois, New York, Indiana, Kansas, Pennsylvania, and Massachusetts) have enacted legislation in this field since Congress passed the Bank Holding Company Act of 1956. It is our opinion based on the wording of the Act, its legislative history and the facts as enumerated above that House Bill No. 272 would not conflict with any federal statute."

It is difficult to perceive how Congress could have more clearly reserved to the State of Louisiana the right to enact Act 275 of 1962 than by the pronouncement contained in 12 U.S.C. 1846, the Federal Bank

Holding Company Act. That Section, boldly entitled "Reservation of Rights to States", provides:

"The enactment by Congress of this Chapter shall not be construed as preventing any state from exercising such powers and jurisdiction which it may now or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Congress specifically defined the word "banks" to include "any national banking association or any state bank"; the term "bank holding companies" to include "any company"; and "subsidiaries" to mean also "any company" with the specified stock relationship to a holding company. 12 U.S.C. 1841(a), (c), and (d). Thus, under the precise language of the Federal Statute itself, state jurisdiction was fully preserved over bank holding companies, such as Whitney Holding Corporation, a Louisiana Corporation, and over its subsidiary the proposed Whitney-Jefferson.

Congress passed the Bank Holding Company Act to regulate and control bank holding companies, not to unleash them from any and all restraints, as petitioners herein seem to contend. The legislative history of the Bank Holding Company Act of 1956 shows clearly that Congress was convinced that bank holding companies were thwarting national banking policy; that they posed a threat to competition in banking; and that immediate controls were urgently required. The Chairman of the Banking and Currency Committee described the purpose of the Act as follows (Congressional Record, 84th Congress, 1st Session, Page 8021):

"The holding company was organized for the purpose of circumventing the banking law. The banking laws in the 1920's generally did not permit any branches. There were no branches of national

banks before 1927. Through the bank holding company device they circumvented the branch banking laws and accomplished something the branch banking laws had attempted to prevent . . . We are now trying to rectify that condition."

Representative Johnson of Wisconsin joined in the House debate on the Act, and he stated (Congressional Record, 84th Congress, 1st Session, Page 8176) :

"I believe this legislation is essential to prevent a most dangerous type of monopoly, the banking monopoly. In my opinion, the bank holding company device leads to uncontrolled branch banking resulting in an undesirable concentration of economic power."

The following excerpts from House Report No. 609 leading up to the passage of the Bank Holding Company Act demonstrates the purpose of the act and the intent of Congress:

"Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests. The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the communities industrial and commercial activities and from the farming population within its vicinity or trade area. Its activities are usually fully integrated with local economic and social organization. The bank hold-

ing company device threatens to destroy this democratic grass roots institution."

“While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks.”

“Your committee believes it obvious that the declared will of Congress in favor of independent competitive banking is being thwarted by indirect branch banking, through the mechanism of the holding company.” House Report No. 609, 84th Congress, 1st Session, May 20, 1955, House Miscellaneous Reports, Vol. III.

With these purposes in mind, it would have indeed been strange if Congress had sought to regulate this form of banking monopoly and undesirable concentration of economic power at the national level while simultaneously depriving the states of their police power to deal with the same economic maladies at the local level. As already noted, Congress had previously adopted state law as the measuring rod under Section 36(e) of the National Bank Act for the establishment of branches by national banks. *Commercial State Bank v. Gidney*, 174 F.Supp. 770, 774 (D.C. 1959), affirmed 278 F.2d 871 (1960). It would therefore be most peculiar if Congress, by reason of the Federal Bank Holding Company Act, had deprived the states of their right to deal with “uncontrolled branch banking” through the “holding company device”.

Congress, of course, did no such thing. When the bill was taken up by the Senate in 1956, Senator

Robertson, Chairman of the Senate Banking and Currency Committee, made it perfectly clear that the states were to retain their complete control over bank holding companies and their bank subsidiaries, *national and state*, within their respective jurisdictions. Senator Robertson, referring to an earlier statement by Senator Maybank, stated:

"Now, to me, states rights means the right of a state to choose its own course of action on a matter within its own jurisdiction and not have the Federal Government make up its mind for it. This is the positive approach. A state should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders. Any Federal legislation which forces a state to change its policies with respect to either branch banking or holding companies would be an unwarranted interference with states rights. . . .

"Therefore, each state, may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. . . ."

Congressional Record, 84th Congress, 2nd Session, Page 6752

The Senate Report in support of the Federal Bank Holding Company Act specifically authorized the states to be "more severe" and "more restrictive" than the Federal Act was on bank holding companies and their subsidiaries within the states borders. At Page 2493 of the United States Code and Congressional News, 1956, the Senate Committee Report states:

"In any event, another provision of this bill expressly reserves to the states a right to be more restrictive regarding the formation of or operation of bank holding companies within their re-

spective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each state, within the limits of its proper jurisdictional authority may be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be, or (2) such federal authorities actually are in their administration of this bill. In the opinion of the Committee, this provision adequately safeguards states rights as to bank holding companies."

At first, the Senate Committee declined to give to the states "automatic jurisdiction" over out of state bank holding companies desiring to acquire banks within the limits of a state. However, again Congress, as a result of an amendment offered by Senator Douglas of Illinois, chose to adopt the law of the state as the measuring stick to determine whether an out of state bank holding company could acquire banks within the limits of the state in question. The Douglas amendment now appears as 12 U.S.C. 1842(d):

"Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the state in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operation unless the acquisition of such shares or assets of a state bank by an out of state bank holding company is specifically authorized by the statute laws of the state in which such bank is located, by language to that effect, and not merely by implication." (See also: Congressional Record, 84th Congress, 2nd Session, Page 6857)

Senator Douglas explained the meaning of his amendment at Page 6858 of the Congressional Record as follows:

"I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act-namely our amendment will permit out of state holding companies to acquire banks in other states only to the degree that state laws expressly permit them; and that is the provision of the McFadden Act."

Thus, in the final analysis, the Federal Bank Holding Company Act contains two separate provisions, both expressly reserving to the states complete control over all bank holding company operations and expansions:

1. 12 U.S.C. 1842(d), which reserves to the states the absolute right to exclude all out of state bank holding companies, and to prevent them from opening banks, *national or state*, within the state's borders; and
2. 12 U.S.C. 1846, which reserves to the states the right to regulate, and if required, to exclude in-state bank holding companies, or to prevent them from opening banks, *national or state*, within the states borders.

It would be an anomalous situation if states were to have the absolute right to exclude out of state bank holding companies and to prevent them from opening banks, without, at the same time, having the power, as now exercised by Louisiana, to prevent bank holding companies within the state's own boundary from opening "in-state banks", whether state or national. By virtue of 12 U.S.C. 1842(d), Congress has taken

from the Comptroller of the Currency the authority to license a national bank within a state which is owned by an "out of state" bank holding company unless the statute laws of the state in which such bank is to be located specifically authorize the acquisition by the "out of state" bank holding company. Congress has likewise removed from the discretion of the Comptroller, by virtue of 12 U.S.C. 1846, the right to license the operation of a subsidiary of a Louisiana bank holding company where the operation of such would be unlawful and prohibited by Louisiana Act 275 of 1962. *Commercial State Bank v. Gidney*, 174 F.Supp. 770, 778, affirmed 278 F.2d 871 (D.C. 1960); *Camden Trust Company v. Gidney*, 301 F.2d 521 (D.C. 1962), cert. denied, 369 U.S. 886; *Whayne Oakland Bank v. Gidney*, 252 F.2d 537 (6th Cir. 1958), cert. denied, 358 U.S. 830.

In effect, Act 275 prohibits evasive or "indirect" branching and Section 36(e) of the National Bank Act prohibits "direct" branching, except in accordance with state law. It is therefore submitted that Act 275 is not only consistent with and permissible under the Federal Bank Holding Company Act, but clearly supplements and strengthens the purpose and intent of the National Bank Act.

In view of the aforementioned congressional history underlying the Federal Bank Holding Company Act, the explicit language of 12 U.S.C. 1846, and the specific holdings in the *Braeburn* case, *supra*, and *Opinion of the Justices*, *supra*, it is submitted that the District Court was eminently correct in holding that Act 275 of 1962 is constitutional; that said Act is directly applicable to Whitney-Jefferson, a wholly owned subsidiary of a Louisiana incorporated bank holding com-

pany; and that the Comptroller of the Currency has no discretion to issue a certificate to said Bank which would authorize an operation prohibited by law.

Petitioners seek to avoid the decisive effect of *Braeburn* and *Opinion of the Justices* by contending that Section 3(5) of Louisiana Act 275 is *sui generis*, and without precedent. Petitioners point to the fact that the statutes approved by the Illinois and New Hampshire courts only prohibited future acquisitions of bank stock by new or existing bank holding companies, whereas Section 3(5) of the Louisiana Act attempts to prohibit an already chartered and existing national bank from doing business. By analogy, petitioner Whitney, erroneously states that "it is no different from the state statute purporting to require the closing of an operating national bank because of a new state legislative determination disapproving of the ownership of its stock, for example, on the ground that more than a certain percentage is owned by a religious or a labor organization." (Whitney Brief, p. 49, 50). However, the analogy is fallacious and the distinction which petitioner attempts to make is without legal significance. Respondent will concede that there is no other State Bank Holding Company Act which has the exact language contained in Section 3(5) of the Louisiana Act. However, this does not change the constitutional issues involved. If Congress has reserved to the states the right to prohibit and restrict the expansion of bank holding companies and, if necessary, to be more severe or restrictive than federal authorities, there is no difference between provisions which seek to restrict bank holding companies by (1) prohibiting the acquisition of stock in a national bank, or (2) by prohibiting a subsidiary of a

bank holding company, not already open for business, from opening for business.

Additionally, petitioners lose sight of the fact that Whitney-Jefferson is the subsidiary of a Louisiana incorporated bank holding company, which subsidiary had not yet opened or engaged in business as a national bank. Petitioners apparently hold the mistaken view that Whitney-Jefferson enjoyed some special status by reason of the fact that it was already organized, even though without a certificate of authority to commence banking business. Respondent submits that Whitney-Jefferson, although organized on paper, had not yet functioned as a national bank and that without a certificate of authority, it was, in actuality, not a national bank lawfully authorized to do business. Section 3(5) is therefore not, as contended by petitioners, an attempt to regulate an operating national bank, but rather a prohibition against the opening of a wholly owned subsidiary of a Louisiana bank holding company, which subsidiary had never engaged in banking business or been licensed as a national bank.

Petitioners further contend that Act 275 is discriminatory. Louisiana has always possessed under the United States Constitution a paramount police power to enact emergency legislation, if necessary, to protect and preserve the vital interest of the community. *Stone v. Mississippi*, 101 U.S. 814; *Douglas v. Kentucky*, 168 U.S. 488; *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398; *Veir v. Sixth Ward Building and Loan Association*, 310 U.S. 32; *East New York Savings Bank v. Hahn*, 326 U.S. 230. Louisiana Act 275 was designated "emergency" legislation and sought as its objective to prohibit the formation of new bank holding companies and the acquisition of

additional banking institutions by existing bank holding companies and their subsidiaries. It would be a strange result indeed if the Constitution, as contended by petitioners, somehow prevented Louisiana from exercising its police power to safeguard the interest of its banking industry in the face of a combined attempt by the Comptroller of the Currency and the largest bank in the state to circumvent and evade existing banking laws; especially after Congress specifically reserved to Louisiana full jurisdiction over banks, bank holding companies and subsidiaries in 12 U.S.C. 1846. If this were true the reservation contained in 12 U.S.C. 1846 would be meaningless.

With regard to Louisiana power in such cases to select the means necessary to protect the vital interest of its economy, the Supreme Court ruled in *East New York Savings Bank v. Hahn*, *supra*, at pages 233-235:

"Once we are in this domain of the reserved power of a state we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary . . .

"It would indeed be strange if there were anything in the Constitution of the United States which denied the state the power to safeguard its people against such dangers."

The fallaciousness of petitioners argument that the act is discriminatory is further demonstrated by the recent decision of the Supreme Court in *Ferguson, Attorney General of Kansas v. Skrupa, d/b/a Credit Advisers*, 372 U.S. 726. In that case, Kansas like Louisiana in the case at bar made it unlawful for any person to engage in a particular business (the prohibited operation was "debt adjusting"). The Supreme Court upheld the constitutionality of the statute, even as it applied to firms engaged in the prohibited business for a

long period prior to the enactment of the state statute. The Supreme Court ruled:

"We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. . . . We refuse to sit as a 'super-legislature to weigh the wisdom of the legislation' . . . nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory'. . . . The Kansas statute may be wise or unwise but relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

For the foregoing reasons respondent, The State Bank Commissioner of Louisiana, respectfully submits that the District Court was correct in upholding the constitutionality of Louisiana Act 275 of 1962 and in ruling that the Comptroller has no discretion to issue a certificate to a subsidiary of a Louisiana incorporated holding company which would authorize a banking operation specifically prohibited by state law:

III.

The State Bank Commissioner of Louisiana Has Standing to Challenge the Unlawful Action of the Comptroller of the Currency in the Case at Bar.

Respondents, Bank of New Orleans and Trust Company, and Bank of Louisiana in New Orleans, are State chartered banks having their principal offices in Orleans Parish. The other respondent, Guaranty Bank and Trust Company, is a State chartered bank located in Lafayette Parish. Each respondent bank derives a substantial volume of business from the East Bank of Jefferson Parish (J.A. 292, 303, 305) but, each is prohibited by Louisiana law from establishing branches in Jefferson Parish or in any other parish other than its home parish. Respondent State banks correctly

state that they have a right under a combination of federal and state statutes to be free of unlawful competition in East Jefferson Parish which would result if Whitney-New Orleans is allowed to establish branches in Jefferson Parish.

The Court of Appeals for the District of Columbia Circuit correctly concluded in the instant case that respondent State banks have standing to bring this action against the Comptroller. The Court stated:

“Clearly, then, under the allegations of their complaint the three state banks have standing. It is not enough to say contra that the Whitney-Jefferson bank will not be a branch of Whitney-New Orleans and that, therefore, the State banks have no legal right to protection against its establishment and consequently no standing to sue. For whether or not Whitney-Jefferson will in legal effect be a branch of Whitney-New Orleans is the question tendered for adjudication, upon which under the circumstances the question of standing in part depends. If it is determined that Whitney-Jefferson is not a branch, it might or might not follow that the State banks have no standing—a matter on which we need not pass; but if it is held to be tantamount to a branch purporting to have been federally authorized, their standing would be indubitable.” (J.A. 467)

The Court went on to say at J.A. 468:

“The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But, where, as here, the threatened competition arises from an allegedly illegal facility, the appellee banks have standing

- to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."

Clearly under the circumstances of the instant case and the prevailing law respondent state banks have standing to challenge the unlawful action of the Comptroller of the Currency. See: *Commercial State Bank of Roseville v. Gidney*, 174 F.Supp. 770, affirmed 278 F.2d 871 (1960); *Wayne Oakland Bank v. Gidney*, 252 F.2d 537, cert. denied 358 U.S. 838; *Wisconsin Bankers Association v. Robertson*, 190 F.Supp. 90, affirmed 294 F.2d 714, cert. denied 268 U.S. 938.

Since the lower court had no difficulty in holding that the state banks have standing to sue in this action, the Court found it unnecessary to decide whether the Louisiana State Bank Commissioner has standing. Respondent submits that it is equally clear that the State of Louisiana through its Bank Commissioner has the right to contest any action of the Comptroller of the Currency which is unlawful under the laws of the State of Louisiana and which would adversely affect state banks under the supervision of the State Banking Department.

After Louisiana adopted Act 275 of 1962, and after the constitutionality of that statute was attacked by petitioners, the State Bank Commissioner of Louisiana moved to intervene as a party plaintiff pursuant to Rule 24 of the Federal Rules of Civil Procedure (J.A. 346). Rule 24 provides in part:

"Intervention"

"(a) *Intervention of Right*. Upon timely application anyone shall be permitted to intervene in

an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . .

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense have a question of law or fact in common. *When a party to an action relies for ground of claim or defense upon any statute . . . administered by a federal or state governmental officer . . . the officer . . . upon timely application may be permitted to intervene in the action.*" (Emphasis supplied)

All parties consented to the intervention (J.A. 385), and the Court thereupon entered an order granting respondent's motion to intervene.

Considering the fact that petitioners have already consented to the filing of a complaint by the State Bank Commissioner, it is respectfully submitted that petitioners cannot now deny respondent's standing. However, petitioners consent notwithstanding, the Commissioner clearly has standing to bring this action under the circumstances of the case at bar.

The State Bank Commissioner is charged with the administration and enforcement of Louisiana Act 275 of 1962. Section 5 of the Act provides:

"The State Bank Commissioner shall administer and carry out the provisions of this Chapter and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Chapter."

In addition to the foregoing statutory duty imposed upon the State Bank Commissioner, respondent is also

charged with the responsibility of enforcing other banking laws of Louisiana, including Louisiana Revised Statutes 6:54 which must be read in conjunction with Section 36(e) of the National Bank Act. In view of the fact that the Attorney General of Louisiana has rendered an opinion declaring that the proposed Whitney operation in Jefferson Parish violates Section 36(e) and LSA-RS6:5 respondent has not only a right, but a duty to challenge the unlawful action of the Comptroller. (J.A. 161-164)²

The following language from the Court of Appeals for the Ninth Circuit in *People of the State of California v. United States*, 180 F.2d 596, 600, 601, is cogent:

“To deny the State the right to intervene in this case would be to deny the State the right to defend those provisions of its Constitution and laws . . .

“If a state may enact a statute, such as California has, it may appear in Court and defend that statute. California has an undoubted right to intervene to protect and assert the validity of its enactment on that subject.”

Considering the fact that the banking laws of Louisiana, including Act 275 of 1962, are administered by the State Bank Commissioner, and that a Louisiana Statute is under constitutional attack, petitioners contention that this respondent has no standing to bring this action is without merit. Rule 24 of the Federal Rules of Civil Procedure; *Guaranty Trust Company v. West Virginia Turnpike Commission*, 109 F.Supp.

² The opinion of the Attorney General of the State of Louisiana is entitled to great weight and should have been considered by the Comptroller. *Michigan National Bank v. Gidney*, 237 F. 2d 762, cert. denied, 352 U.S. 847.

286, 294; *All America Airways, Inc. v. Cedarhurst*, 201 F.2d 273, 274; *Securities and Exchange Commission v. United States Realty and Improvement Company*, 310 U.S. 434, 458, 459, 460.

CONCLUSION

The preservation of the competitive system in this Country, particularly in the field of banking, must be maintained if this Country is to retain its vitality. The Whitney plan represents a deliberate attempt by a national bank to circumvent federal and state laws restricting branch banking and to undermine the competitive equality heretofore existing between states and national banks. If this scheme is allowed to materialize the protection historically afforded to state banks by Section 36(e) of the National Bank Act will be destroyed and Congressional intent will be frustrated.

For the foregoing reasons respondent prays that the decision of the Court of Appeals be affirmed and that the Comptroller of the Currency remain permanently enjoined from issuing a certificate of authority which would license a banking operation prohibited by law.

Respectfully submitted,

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